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IN THE

Supreme Court of the United States

October Term, 1951.

No. 443

UNITED STATES OF AMERICA,

Appellant,

vs.

EFROIM SPECTOR,

Appellee.

BRIEF FOR THE APPELLEE.

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vs.

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Appellee.

BRIEF FOR THE APPELLEE.

Opinion Below.

The opinion of the District Court dismissing the second and fourth counts of the indictment [R. 8-13] appears at 99 Fed. Supp. 778.

Question Presented.

Section 20(c) of the Immigration Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950, 64 Stat. 1010, 8 U. S. C., Supp. IV, 156(c), establishes various criminal offenses for certain classes of aliens ordered deported under various provisions of the immigration and deportation laws. The question in this case is whether Section 20(c) is so uncertain and vague as to fall short of satisfying the requirements of the due process clause of the Fifth Amendment.

Statute Involved.

Section 20 of the Immigration Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950, *supra*, is set forth in full in Appendix A to the government's brief herein, at pages 25-32.

Summary of Argument.

The particular clause of Section 20(c) held by the trial court to be "void for vagueness" provides that any alien within the prescribed classes who "shall wilfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure . . . shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years." The judgment below was right in finding this clause fatally uncertain in failing to specify the nature of the travel documents required to be sought by the alien and the country, or the number of countries to which the alien was required to make application. In addition the clause lacks constitutional clarity with respect to the time or stage at which the alien must act if he is to avoid prosecution and punishment under it. Moreover, the clause is an integral part of a section which throughout is characterized by fundamental uncertainties. Thus it is impossible to determine from the section or its context to what aliens or classes of aliens its several penal provisions are applicable. None of these deficiencies is cured by the limitation of the punishment to wilful non-compliance in bad faith. Since the section establishes new offenses and requires affirmative conduct its directions must be clear and specific. Because they are not, Section 20(c) in its entirety is fatally uncertain and all four counts of the indictment should have been dismissed.

ARGUMENT.

I.

The Statute Is Void for Vagueness in the Respects Found by the Trial Court.

Of necessity, the validity of a statute challenged for want of the clarity and definiteness required by the due process clause hinges upon the choice and arrangement of the words selected by the legislature. The variety of language being infinite, especial caution is necessary in generalizing from the many decisions in this constitutional area.

Perhaps the clearest summary of the several tests evolved by this Court is that made by Mr. Justice Sutherland in *Connally v. General Construction Co.*, 269 U. S. 385, 391. The opinion there found that statutes of questioned certainty have survived attack when they "employed words or phrases" classified as follows:

(1) "having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them." Illustrative cases cited were *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, and *Omaechevarria v. Idaho*, 246 U. S. 343. To these might be added *Sproles v. Binford*, 286 U. S. 374, and *Boyce Motor Lines, Inc. v. U. S.*, 96 L. Ed. (Adv. Opp.) 249;

(2) having "a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ," citing *Nash v. U. S.*, 229 U. S. 373, and *Int'l Harvester Co. v. Ky.*, 234 U. S. 216, to which might be added *Champlin Refining Co. v. Corp. Commission*, 286 U. S. 210; or

(3) from which, "'for reasons found to result either from the text of the statute involved or the subjects with which they dealt, a standard of some sort was afforded.'" *U. S. v. L. Cohen Grocery Co.*, 255 U. S. 81, 92. Other cases in this group would include *Mahler v. Eby*, 264 U. S. 32; *Gorin v. U. S.*, 312 U. S. 19; *U. S. v. Ragen*, 314 U. S. 513.

Landmark cases illustrative of legislation failing by all of these tests are *Lanzetta v. N. J.*, 306 U. S. 451; *Cline v. Frink Dairy*, 274 U. S. 445, and *Connally* itself. They reaffirmed the dictum of *U. S. v. Reese*, 92 U. S. 214, 220, that especially when it defines a new offense the legislature must speak with unmistakable certainty.

Since the clarity of a statute is an objective matter, want of it is not supplied by even the clearest requirement of a subjective intent on the part of the person affected. While such a requirement may avoid punishments for offenses "of which the accused was unaware," it "may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain." (*Screws v. U. S.*, 325 U. S. 91, 102.) "Of course, wilful conduct cannot make definite that which is undefined." (*Idem.*, 105.)

Within the framework of these well settled principles we turn to an examination of the statute in question here. We shall deal first with the clause held by the trial court to be too vague and uncertain to meet constitutional requirements. In a subsequent section of this brief we shall discuss other provisions of the statute.

A. The Questioned Clause Lacks Any Ascertainable Standard of Guilt.

The clause of the statute which the trial court held to be lacking in the definiteness required by the due process clause, and upon which counts two and four of the indictment were based, purports to punish an alien awaiting deportation who "shall wilfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure." This is one of four clauses in the section, each of which is apparently intended to establish as a separate offense certain types of conduct or omissions on the part of such an alien. Considered independently as a definition of a crime upon which indictment and prosecution may be predicated, the clause in question plainly lacks that certainty which the Fifth Amendment requires.

The alien is told that he must make "timely application" for documents. Within the limits of the clause itself, however, there is nothing which tells him at what point he must act, or when his application is or is not "timely." No affirmative command elsewhere in the statute fills this gap. This is not a case where the legislature has imposed criminal sanctions upon failure to carry out a previous direction or to obey an earlier stated prohibition. Unless the alien can determine what he must do and when it must be done from the language of the penal provision itself, he is left wholly without a guide as to his duty.

The trial court construed the clause in question by reading it in connection with the preceding clause punishing the alien "who shall wilfully fail and refuse to depart from the United States within a period of six months from the date" of his deportation order, or of enactment

of the Subversive Activities Control Act of 1950 (Sept. 23, 1950), whichever is later. The very fact that resort to another clause, stating a separate and independent offense, is necessary bears testimony to the failure of the Congress to define the crime in question here with self-sufficient positiveness.

Assuming, however, that the trial court's construction was a proper one, the meaning of the provision still remains obscure. Putting aside for later analysis the question of what duty is imposed, there remains the gravest doubt as to when it attaches.

In its brief the government points out that Section 20(a) permits the alien to specify the country to which he shall be deported. But this is a privilege which the alien may or may not choose to exercise. Election is not mandatory, 8 C. F. R. 151.2(c). If the alien chooses not to designate any country, the question arises at what point he must "make timely application" to some. The government in its brief (pp. 17, 18, 19, 20, 21) repeatedly asserts that in such a situation the Attorney General "will have selected a country for deportation" and "will normally advise the alien of his decision and ask him to obtain or fill out whatever documents are necessary" (Govt. Br. p. 19). But while the statute doubtless permits the Attorney General to do this, it does not require it. No obligation to notify the alien of the country of deportation is imposed upon the government. In its brief the government acknowledges that "where a 'refusal' is charged *there must be proof that the alien has been told what he must do*" (Govt. Br. p. 21; emphasis supplied). Hence the statute lacks what the government's theory in effect concedes to be an essential ingredient of the offense.

If the questioned clause read as the government reads it, its definiteness might never have been attacked. Had it directed the alien to make prompt application for admission to any country designated to him by the Attorney General on pain of criminal punishment for his refusal, a different issue would be presented. This in substance is what the government says the statute means. But this is not what it says. On the contrary, it requires him to make "timely application . . . for travel or other documents necessary to his departure." When, where, to whom, for what, how many times, are questions left open and unanswered.

The government suggests that should the Attorney General fail to inform the alien of the country of deportation, an eventuality which it discounts, "the alien would seem to have an affirmative duty to choose some country and to apply thereto for travel documents" (Govt. Br. p. 20). If so, there is a conflict between the questioned clause and Section 20(a) which, as already noted permits the alien to designate a country or not as he chooses. Let us suppose, however, that the alien makes application to country A. While it is pending the Attorney General notifies him that country X has been designated as the country of deportation. Must the alien then also make application to country X? Or has he already satisfied the requirements of the statute? If country A rejects his application, must the alien then apply successfully to countries B, C, D, E, and so on? The government would answer in the affirmative, but the answer is not to be found in the language of the statute.

Indeed the Immigration and Naturalization Service itself demonstrates something less than perfect understand-

ing of the statute's operation. Its Form I-229 (Govt. Br., App. B, pp. 32-33) contains the following paragraphs:

> "Arrangements to effect your deportation pursuant to such order are being made and when completed you will be notified when and where to present yourself for deportation.
>
> * * * * * * * *
>
> "Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950."

The recipient of this form is not told when he should begin "making every effort to obtain" travel documents. If he proceeds to do so at once, and is successful, he may be unable to present himself "for deportation" as the first paragraph directs. If "arrangements to effect [his] deportation . . . are being made," it may be unnecessary for him to make independent efforts to depart. Yet if he awaits notification to report for deportation, he may be subject to prosecution for failure to make "timely application" for travel documents. The perplexing features of the statute are mirrored in the administrative application.

We are told that the section's purpose, as evidenced by the legislative history, was to accomplish deportation

where the government has been unable to effect it. In lieu of official process the alien is directed to bring about personally the result which government, with all of its power and resources, has been powerless to achieve. In effect, the Congress has said,

> "When you have been ordered deported, you must depart yourself, somehow or other. It is up to you to figure out how to do this and if you don't you may be guilty of a felony."

Policy and equity considerations aside, we submit that no such mandate furnishes an adequate guide to the persons affected. If the alien can be compelled at all to do what the government is unable to do, the due process clause requires that the directions given him be unmistakably clear and definite. This the statute obviously is not.

Section 20(c), according to the legislative reports (Govt. Br. pp. 6-12), represents a new departure in immigration and deportation legislation. The offenses which it purports to establish have no precedent in our law, in contrast to those defined in such cases as *Gorin v. U. S.*, 312 U. S. 19, and *U. S. v. Ragen*, 314 U. S. 513. Where the legislature undertakes "to define by statute a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind." (*U. S. v. Reese*, 92 U. S. 214, 220.) The present statute is a trap for the unwary and a puzzle for the astute. The judgment of the trial court, while unduly narrow, was correct and should be affirmed.

B. The Questioned Clause Fails to Define Clearly What Duty Is Imposed Upon the Persons Affected.

In its brief the government brushes aside the trial court's finding that the phrase "for travel or other documents necessary to his departure" is fatally uncertain. It contends that "travel documents" in the context of the section "can have no other meaning except those official documents required in order lawfully to enter another nation." (Govt. Br. p. 15).

Again the government recasts the statute. The questioned clause does not speak of documents needed "to enter another nation." It talks of documents "necessary to his *departure*" (emphasis supplied). Hence Judge Mathes' query as to the sufficiency of purchasing a bus ticket to Tijuana, Mexico is apt, since such a document would effect "departure." The government suggests that a ticket is not properly described as a "document." But an approved dictionary definition of the term describes it as "A *document* which serves as a certificate, license, permit or the like; a voucher." Webster, New International Dictionary, 2d Edition (emphasis supplied).

We are told that in the context of the statute the phrase is sufficiently defined as "passports, other travel documents or deportation facilities" (Govt. Br. p. 16). We are also referred to one other federal statute which uses the term (*Idem*, p. 15, footnote 6).

The very fact that the phrase appears so seldom in our law testifies both to its novelty and to the absence of a gloss such as might be wrought by frequent use. On the other hand, reference to the requirements of the countries of the world for admission to their territories readily discloses a vast variety of "documents" employed in con-

nection with international passage. Indeed, this very question has been the subject of a number of international conferences.[1]

Cursory examination of the reports and proceedings of these conferences reveals that a dozen or more different types of documents are utilized by various countries of the world in connection with admissions to their territories. They include passports (individual and collective or family), transit visas, transit cards, identity coupons, entrance or entry visas, consular visas, passport visas, immigration visas, preliminary visas, certificates (Denmark, Uruguay), identity documents and border crossing cards (U. S.).[2] Various proposals for adoption of a common international certificate, such as an emigrant's identity book, have been proposed[3] but none has been adopted. In 1897 the Government Printing Office issued a summary of the passport regulations of some forty foreign countries[4] but this compendium has not been kept up to date, and no similar publication appears to have been issued during the ensuing 55 years.

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[1]See Minutes of Plenary Meetings, Passport Conference, League of Nations, May, 1926; Action Taken By Governments on the Recommendations Adopted By The Second Conference On The International Regime of Passports, Advisory and Technical Commission for Communications and Transit, League of Nations, Geneva, 1929; Inter-Governmental Committee On Refugees, Preparatory Documents Concerning The Adoption of an Identity and Travel Document For Refugees Coming Within the Mandate of the Inter-Governmental Committee, London, 1946.

[2]See proceedings of conferences referred to in footnote 1, *supra*.

[3]Minutes of Plenary Meetings, Passport Conference. League of Nations, *supra*, p. 21.

[4]Passport Regulations of Foreign Countries, Government Printing Office, 1897.

Thus the alien affected by the questioned clause of Section 20(c) is confronted with the necessity of threading his way through a maze of regulations, varying from country to country. The complexities of even casual international travel are commonly known. Multiplied many fold in the case of one seeking admission to permanent residence in a strange land, they confront the alien with a bewildering confusion.

The government contends that aliens affected by the statute retain such ties with the country of their origin as to be "in a peculiarly favorable position to know the meaning of travel and other documents necessary for departing from one country for another" (Govt. Br. p. 16). The assumption seems to be that all or most resident aliens are recent arrivals in the United States who retain close connections with their native lands or other countries in which they may have lived. This assumption is not supported by anything in the legislative record and is contrary to readily ascertainable facts. The tide of immigration into the United States reached its peak prior to the First World War and has receded steadily ever since, to the accompaniment of ever increasing restrictions upon entry.[5] While many of those who came here a generation or more ago have become naturalized, many for various reasons have not. Thus hundreds of thousands of

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[5]The numbers of aliens admitted to the United States by decades since 1901 is as follows: 1901-1910, 8,795,386; 1911-1920, 5,735,811; 1921-30, 4,107,209; 1931-40, 528,431. S. Rep. 1515, 81st Cong., 2d Sess., pp. 157, 815.

aliens now living in the United States came here with their parents as children, and have lived here a generation or more. Some 60% are more than 45 years old.[6] Illustratively, the defendant in the case at bar, as the record shows, came to the United States in 1913, and has lived his entire adult life here [R. 6, 8]. The same would seem to be true with respect to a number of the other aliens whose cases are mentioned in the Committee reports.[7]

Thus it is not the fact, as the government asserts, that those within the reach of section 20(c) are "in a peculiarly favorable position" to know what "travel and other documents" are and how to obtain them. On the contrary, those who came here as children can have understood little or nothing about the mechanics of their admission. Those who came a generation or more ago, even as young adults, have long since forgotten. Nor do such expatriates necessarily retain close ties with their former homes. To most if not all, this country is home—often the only one they know, the only one where living human roots exist.

By the same token, due to a complex of social factors, the alien even after many years of residence often remains "a stranger in a strange land." Especially among the older groups, education frequently is limited and experience confined to that of working people generally. The foreign born thus are among those least able to cope with "official

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[6]Of the 5,009,857 aliens registered under the Alien Registration Act (54 Stat. 673, 8 U. S. C. 451 *et seq.*) as of December 26, 1940, 2,901,995 or 57.92% were 45 years of age or more. The median age was 52.9 years. S. Rep. 1515, 81st Cong., 2d Sess., p. 158. Considered together with the figures on admissions to the U. S. (footnote 5, *supra*), these statistics make it apparent that a very large proportion of the alien population has been resident here for long periods of years.

[7]H. Rep. 1192, 81st Cong., 1st Sess.; S. Rep. 2239, 81st Cong., 2nd Sess.

documents" and the procedures by which they are procured. Instead of being advantaged by their birth they face peculiar handicaps in attempting to unravel the mysteries of international intercourse. (See *Delgadillo v. Carmichael*, 332 U. S. 388.)

The case thus is entirely unlike *Boyce Motor Lines v. U. S.*, 96 L. Ed. (Adv. Ops.) 249, where the defendant carrier was charged under a regulation adopted for his own industry with the active participation of industry representatives. The employers of every affected carrier have to be conversant with its terms. (49 C. F. R. 197.02.) Thus the defendant in *Boyce* was indeed "in a peculiarly favorable position to know the meaning" of the regulation. The contrary is the case with aliens subject to Section 20(c).

There remains, as the trial court pointed out, the further question whether the statute requires persons affected to make application only to one country or to all countries represented by consulates or otherwise in the city, country or state of the alien's residence, or by embassies and legations maintained in the capital. How far the alien must go, on how many doors he must knock, how many rebuffs he must receive before he has discharged his obligations under the statute, no one can tell. If "departure" is all that is required, as the face of the statute declares, he might stop when he has secured appropriate authority to leave the United States. This would not effect his deportation, which is the object of the law. To accomplish that might require numerous applications to each of a large number of countries. Even if effort and not success is the only demand, the stopping point is unmarked, left to conjecture. (*Collins v. Kentucky*, 234 U. S. 634, 638; see *U. S. v. Evans*, 333 U. S. 483, 486-488.)

C. The Fact That the Statute Punishes Only Wilful Violations Is Not Enough to Overcome Its Deficiencies.

The faults of the statute are the greater, as the trial court noted, since it in effect requires affirmative action. And the inclusion of the element of bad faith is not enough to overcome them. While it is true that "A mind intent upon wilful evasion is inconsistent with surprised innocence," (*U. S. v. Ragen*, 314 U. S. 513, 524, a mind intent upon bona fide compliance is compatible with bewildered uncertainty. The best intentions in the world are no substitute for inadequate performance.

> "The requirement that the act must be wilful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects undefined."
>
> *Screws v. U. S.*, 325 U. S. 91, 102.

Analysis of the cases shows that this Court has consistently held that there must be an area in which application of the statute is clear by virtue either of common experience (*e. g., Hygrade Provisions Co. v. Sherman, supra*), of well settled common law meaning (*e. g., Nash v. U. S., supra*), or of the text or subject of the statute itself (*e. g., U. S. v. L. Cohen Grocery Co., supra*). Where such a central core of clear definition is present, problems of the application of the legislation on the periphery are met by the scienter test. But "wilful conduct cannot make definite that which is undefined" (*Screws v. U. S., supra*, at 105). For if there is no area of certainty the state of mind is irrelevant, since no one can tell what is required or prohibited and "men of common intelligence must necessarily guess at its meaning and differ as to its application" (*Connally v. General Construction Co.*, 269 U. S. 385, 391).

II.

In Addition to the Grounds Relied Upon by the Trial Court, the Statute Is Fatally Uncertain in Other Respects.

The judgment of the trial court, holding invalid the clause of Section 20(c) on which the second and fourth counts of the indictment were based, rests upon narrow grounds. It wholly ignores other deficiencies in the section which the appellee deems equally critical. We turn now to an examination of these, prefaced by brief reference to the authorities supporting our right to assert such related grounds.

A. This Court Will Review Grounds of Attack Upon the Statute Which Were Rejected by the Trial Court.

In reviewing the judgment below, this Court will be called upon to examine "the entire text of the statute" (*Winters v. New York*, 333 U. S. 507, 518), in order to appraise its context (*American Communications Assn. v. Douds*, 339 U. S. 382). So doing, it will of necessity confront questions of the clarity and definiteness of other provisions of the section of which the questioned clause is an integral part.

Moreover, if this Court should disagree with the conclusions of the trial court, it will review grounds in support of the judgment which were rejected below (*United States v. Curtiss-Wright Export Co.*, 299 U. S. 304; Wolfson and Kurland, *Jurisdiction of the Supreme Court of the United States*, page 335).

It follows that appellee may properly urge here additional uncertainties in Section 20(c) which render it fatally deficient.

B. Section 20(c) Fails to Define Sufficiently the Persons Subject to Its Terms.

Section 20(c) establishes four separate offenses of which certain deportable aliens may be convicted. The aliens subject to its terms are classified according to the legislative foundation of the deportation orders outstanding against them. Three of these are clearly stated, being respectively the Act of October 16, 1918, as amended, the Act of February 9, 1909, as amended, and the Act of February 18, 1931, as amended. The fourth, however, is couched in the following terms:

> "(4) so much of section 19 of the Immigration Act of 1917, as amended (39 Stat. 889-890; 54 Stat. 671-673, 56 Stat. 1044; 8 U. S. C. 155) as relates to criminals, prostitutes, procurers or other immoral persons, anarchists, subversives and similar classes."

Under this last clause it becomes necessary to examine Section 19 of the Immigration Act of 1917, as amended, in order to determine if possible what part or parts of that statute relate to the types and classes of persons listed.

Section 19 appears in Title 8 of the United States Code as Section 155. It constitutes the major statutory scheme[8] for the deportation of undesirable aliens, and defines classes of aliens made subject to deportation. The section nowhere employs as terms of classification the words "criminals, prostitutes, procurers or other immoral persons, anarchists, subversives," which are used as such in Section 20(c). In order to explore their meaning and application, therefore, Section 155 must be analyzed in some detail.

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[8]Prior to the enactment of the Subversive Activities Control Act, 64 Stat. 1010, which substantially enlarged the sweep of the Act of October 16, 1918.

"Criminals." Certain of the provisions of Section 155 deal in express terms with persons convicted of crime. Other provisions classify as deportable, aliens committing certain acts in violation of law without reference to their prosecution or conviction for those acts. At the threshold of the inquiry, therefore, ambiguity is encountered since Section 20(c) fails to indicate whether the term "criminals" is intended to mean only those who have been convicted after prosecution or to include those who have committed an infraction of law, without reference to prosecution and conviction.[9]

Putting aside this underlying uncertainty, Section 155 is found to contain the following definitions of aliens who may or may not be said to come within the Section 20(c) classification "criminals." It lists as deportable "any alien who shall have entered or who shall be found in the United States in violation of this chapter [Title 8, U. S. C., ch. 6, secs. 100-246] or in violation of any other law of the United States." It likewise includes aliens sentenced to imprisonment for a term of one year or more "because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States," and aliens sentenced more than once to imprisonment for terms of a year or more "because of conviction in this country of any crime involving moral turpitude, committed at any time after entry." Also declared deportable are aliens

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[9] The legislative history suggests a purpose to use the term as synonymous with "confirmed criminal," or "habitual criminal." H. Rep. 1192, 81st Cong., 1st Sess., p. 9. See *Tan v. Phelan*, 333 U. S. 6. But no such limitation is expressed or implied in the statute itself and it would, in any event, hardly solve the problem.

convicted or who admit the commission prior to entry "of a felony or other crime or misdemeanor involving moral turpitude."

It may be noted that Section 155 requires the deportation of aliens guilty of "crimes involving moral turpitude" committed before as well as after entry into this country; thus it applies to aliens guilty of such offenses in any part of the world. It is an exacting task at best to determine whether a crime committed in this country involves "moral turpitude," defined as conduct failing to accord with "moral standards that prevail in contemporary society," *Jordan v. DeGeorge*, 341 U. S. 223, Jackson, J., dissenting, pages 237-238. As Mr. Justice Jackson there pointed out, moral standards differ in different parts of the United States. To determine the moral standards that prevail in different parts of the world, varying as they do not only from those in the United States but from each other, is an insuperable task. Moreover, since the statute applies not only to aliens convicted prior to entry but to those who admit the commission of such a crime prior to entry, there is no possible way of determining whether the moral views, or the courts, of the country where the act was committed would hold that it constituted either a criminal offense or immoral conduct.

The section also authorizes deportation of "any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials . . ." Some, at least, of these acts constitute crimes under other statutes. (See, *e. g.*, 18 U. S. C., Section 2385.)

Whether it is the purpose of Congress in Section 20(c) to reach aliens ordered deported under this clause as "criminals," as "subversives" or at all, however, it is impossible to determine from the provisions of the statute. (See *U. S. v. Evans*, 332 U. S. 483.)

"Prostitutes." The common meaning of this term is familiar enough, and if it were the only word used for the purpose in Section 155 no serious difficulty would be presented. The section, however, classes as deportable not only aliens found to be inmates of houses of prostitution and practicing prostitution, but others whose connection with such activity is more or less remote. Thus, the section applies to "any alien . . . connected with the management of a house of prostitution," to "any alien who manages or is employed by, in or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes or where prostitutes gather"; and to any alien "who in any way assists any prostitute or protects or promises to protect from arrest any prostitute." Can it be said with any certainty that aliens ordered deported upon any or all of these grounds were or were not intended to be covered by Section 20(c) when it speaks of "so much of" Section 155 "as relates to . . . prostitutes"? Or are these classes of aliens within the catch-all, "or other immoral persons"?

The same questions arise with respect to the clause of Section 155 requiring the deportation of "any alien who, after being excluded and deported or arrested and deported as a prostitute, or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes in any of the ways hereinbefore specified, shall return to

and enter the United States." Is Section 20(c) to be read as incorporating this clause and thus as applicable to ex-"prostitutes," ex-"procurers" and formerly "immoral persons" who may have mended their ways? Logical arguments could be made for either result.

"Procurers." A procurer is defined as "One whose business it is to supply women to seducers or houses of ill fame; a pander; a pimp." Webster, New International Dictionary, Second Edition. Nothing in Section 20(c) or Section 155 suggests that Congress employed the term in any different meaning. Yet Section 155 in addition to listing activities within this definition, also includes any alien "who in any way assists any prostitute or protects or promises to protect from arrest any prostitute." It covers "any alien who shall import or attempt to import any person for the purpose of prostitution or for any other immoral purpose." In addition, it applies to "any alien convicted and imprisoned for a violation of any of the provisions of Section 138 of this title" (8 U. S. C.), a section which imposes criminal penalties for importing or attempting to import aliens "for the purpose of prostitution or for any other immoral purpose," and various other offenses related to the practice of prostitution and the maintenance of houses of prostitution. We are furnished with no guide whatever for determining whether Section 20(c) is operative against aliens ordered deported under any of these provisions.

"Other Immoral Persons." The vagueness of this phrase is self-evident. It is compounded by the fact that the same phrase appears in the reference statutes, Sections 155 and 138, without other elucidation. Moreover, the deficiencies characteristic of the term "crime involv-

ing moral turpitude" are present in equal degree in this phrase. It seems obvious that Congress did not intend to subject to the stringent requirements of Section 20(c) aliens employed as musicians in dance halls. Yet Section 155, to which it refers, authorizes the deportation of such persons.

"Anarchists." Webster defines an anarchist as "one who advocates anarchy or believes in anarchism . . ." Anarchy is defined as "absence of government . . ." The preferred definition of anarchism is:

> "1. The theory that all government is an evil . . . At its best, it stands for a society in which each person produces according to his powers and receives according to his needs. At its worst, it stands for a terroristic resistance to all present government and social order . . ." (Webster, New International Dictionary, Second Edition.)

Section 155 classes as deportable "any alien who at any time after entry shall be found . . . advocating or teaching anarchy . . ." Presumably this would include those teaching anarchy "at its best" as well as those advocating its most extreme form. But this phrase occurs in the middle of a clause establishing various other classes of deportable aliens in the following language:

> "any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or assassination of public officials; . . ."

Does Section 20(c) cover aliens ordered deported under each of these provisions? The statute furnishes no answer.

The remaining categories incorporated in Section 20(c) by reference to Section 155 are "subversives and similar classes." The term "subversive" appears to have first been used, in a statute, in the Legislative Reorganization Act of 1946 (60 Stat. 828), which authorized the House Committee on Un-American Activities to investigate "the diffusion . . . of subversive and un-American propaganda that . . . attacks the principles of the form of government as guaranteed by our Constitution . . ." The term is defined neither in that act nor elsewhere in the Criminal Code. It is not included among the definitions of terms employed in the Internal Security Act of 1950 (8 U. S. C., Sec. 782). In practice it is used to cover so wide a variety of views that it must be taken now to mean nothing more than political heterodoxy. (See Edgerton, J., dissenting, *Barsky v. United States* (C. A. D. C., 1948), 167 F. 2d 241, 252-263; Clark, J., dissenting, *United States v. Josephson* (C. A. 2, 1947), 165 F. 2d 82, 93-100.)

The phrase "similar classes" appears to modify each of the classifications listed in Section 20(c). Since they are not only vague in themselves but belong to no common category, this phrase merely compounds the confusion.

Authority is hardly needed for the proposition that a statute, if it is to satisfy the due process clause, must be plain and definite not only as to what it requires or pro-

hibits, but as to the persons "who are subject to it" (*Connally v. General Construction Co.*, 369 U. S. 385, 391), "those to whom the statute is directed" (*American Communications Assn. v. Douds*, 339 U. S. 382, 412). If the persons charged with a duty are not clearly designated by the statute, the legislation fails to meet the requirements of the Fifth and Sixth Amendments. (*First National Bank v. United States* (C. C. A. 8, 1913), 206 Fed. 273; see *United States v. Winchester* (C. C. A. 2, 1930), 40 F. 2d 472; *Arnold v. United States* (C. C. A. 8, 1940), 115 F. 2d 523.)

It is no answer here that the indictment below alleged that appellee was ordered deported under the Act of October 16, 1918 [R. 1], and that the uncertainties described above are not present in this case. This is a challenge of the statute on its face, and it is "the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." (*Lanzetta v. New Jersey*, 306 U. S. 451; 453; *United States v. Petrillo*, 332 U. S. 1; *Thornhill v. Alabama*, 310 U. S. 88, 97-98.)

> "An accused . . . does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him." (*Thornhill v. Alabama*, op. cit., *supra*.)

Conclusion.

For all the foregoing reasons the judgment of the District Court dismissing counts two and four of the indictment should be affirmed and the order denying the motion to dismiss counts one and three of the indictment should be reversed with directions to grant the motion.

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Service of the within and receipt of a copy thereof is hereby admitted this.....day of February, A. D. 1952.

2-27-52—60